

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

RENETTE POWELL,

Plaintiff,

v.

MICHAEL ASTRUE,  
Commission of the Social  
Security Administration,

Defendant.

Case No. CV 06-6907-OP

ORDER GRANTING PLAINTIFF'S  
MOTION FOR ATTORNEY'S FEES  
PURSUANT TO 42 U.S.C. § 406(b)

**I.**

**INTRODUCTION**

After a denial of an application for supplemental security income ("SSI") benefits under Title II of the Social Security Act, Plaintiff sought review in this Court of Defendant's decision denying her benefits. After the parties filed the Joint Stipulation, the Court found for Plaintiff and ordered remand for payment of benefits. Pursuant to the parties' stipulation, this Court ordered payment for EAJA fees in the amount of \$4,000.00. On remand, the Commissioner granted Plaintiff's application for benefits, entitling her to receive approximately \$40,216.00 in retroactive benefits under Title II. Plaintiff has now filed a Motion for Attorney's Fees pursuant to 42 U.S.C. § 406(b)

1 (“Motion”). Defendant submitted a Response to the Motion (“Response”).<sup>1</sup> Plaintiff  
 2 also submitted a Reply to the Response. For the reasons discussed below, the Motion is  
 3 GRANTED.

## 4 II.

### 5 PROCEDURAL HISTORY

6 The Law Offices of Lawrence D. Rohlfsing represented Plaintiff before the  
 7 United States District Court on the basis of a retainer agreement to cover those services  
 8 calling for fees of 25% of the back benefits. After the parties filed the Joint Stipulation,  
 9 the Court found for Plaintiff and ordered remand for payment of benefits. Pursuant to  
 10 the parties’ stipulation, this Court ordered payment fo EAJA fees in the amount of  
 11 \$4,000.00. On remand, the Commissioner granted Plaintiff’s application for benefits,  
 12 entitling her to receive approximately \$40,216.00 in retroactive benefits under Title II.  
 13 The Motion seeks \$10,000.00 in attorney fees along with a reimbursement to Plaintiff  
 14 for the \$4,000.00 in EAJA fees already paid. (Mot. at 1, 2; Reply at 1.)

## 15 III.

### 16 DISCUSSION

#### 17 A. Fees Awarded To Attorneys Who Successfully Represent Social Security 18 Benefit Claimants In Court.

19 An attorney who successfully represents a Social Security benefits claimant in  
 20 court may be awarded as part of the judgment “a reasonable fee for such representation,  
 21 not in excess of 25 percent of the total of the past-due benefits” awarded to the clamant.<sup>2</sup>  
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 24 <sup>1</sup> Because the Commissioner is not a party to the contingency fee agreement between  
 25 Plaintiff and her attorney, he simply “offers below an analysis of the fees sought in the  
 26 event that it may assist the court in the Court’s determination.” (Response at 2.)

27 <sup>2</sup> For representation of a benefits claimant at the administrative level, an attorney  
 28 may file a fee petition or fee agreement. 42 U.S.C. § 406(a). In the event of a  
 determination favorable to the claimant, the Commissioner “shall . . . fix . . . a reasonable

1 42 U.S.C. § 406(b)(1)(A). The fee is payable “out of, and not in addition to, the amount  
2 of [the] past-due benefits.” *Id.* Because benefits amounts figuring in the fee calculation  
3 are limited to those past due, attorneys may not obtain additional fees based on a  
4 claimant’s continuing entitlement to benefits.

5 Fee awards may be made under the Equal Access to Justice Act (“EAJA”), as  
6 well as 42 U.S.C. § 406(b) (“Section 406(b)"). As was the case here, Plaintiff was  
7 previously awarded EAJA fees in the amount of \$4,000.00 for services rendered by  
8 counsel in securing the remand of his case. An EAJA award, however, offsets an award  
9 under Section 406(b) so that the total past-due benefits actually received by the claimant  
10 is increased by the amount of the EAJA award up to the point where the claimant could  
11 potentially obtain one hundred percent of past-due benefits. *Gisbrecht v. Barnhart*, 535  
12 U.S. 789, 796, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002) (citation omitted).

13 **B. The Applicable Case Law.**

14 In *Gisbrecht*, the Supreme Court resolved a circuit split in the appropriate method  
15 of calculating fees under Section 406(b). Several circuits, including the Ninth Circuit,  
16 had followed the “lodestar” method, under which the number of hours reasonably  
17 devoted to each case was multiplied by a reasonable hourly rate. *Gisbrecht*, 535 U.S. at  
18 799 (citations omitted). Other circuits had given effect to an attorney-client contingent-  
19 fee agreement if the resulting fee were reasonable. *Id.* (citations omitted).

20 The Court evaluated the two approaches and concluded that Section 406(b)  
21 (limiting attorney’s fees to twenty-five percent of past-due benefits) was designed to  
22 control, and not displace, contingent fee agreements that are within the statutory ceiling.  
23 *Id.* at 807-09. The Court held that Section 406(b) “calls for court review of such

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25 fee” for the attorney’s services. *Id.* § 406(a)(1). As an alternative to fee petitions, an  
26 attorney may file a contingency fee agreement with the Agency in advance of a ruling on  
27 the claim for benefits. *Id.* §§ 406(a)(2)-(4). If the ruling is favorable to the claimant, the  
28 Agency will generally approve the agreement subject to certain limitations. *Id.* §§  
406(a)(2)(A)(ii) and (iii).

1 arrangements as an independent check, to assure that they yield reasonable results in  
2 particular cases.” *Id.* at 807; *see also Hearn v. Barnhart*, 262 F. Supp. 2d 1033, 1036  
3 (N.D. Cal. 2003) (*citing Gisbrecht*). In rejecting the lodestar approach, the Court noted  
4 that, while the lodestar method was used in federal-court adjudication of disputes over  
5 the amount of fees properly shifted to the loser in litigation, fee-shifting to a losing  
6 party was not relevant in Section 406(b) cases. *Gisbrecht*, 535 U.S. at 802. As the  
7 Court observed, Section 406(b) does not authorize the prevailing party to recover fees  
8 from the losing party; rather, it authorizes fees payable from the successful party’s  
9 recovery. *Id.*

10 In testing the reasonableness of fees yielded by contingency fee agreements  
11 within Section 406(b)’s twenty-five percent ceiling, courts have examined the character  
12 of the representation and the results achieved. *Id.* at 808. For example, if an attorney is  
13 responsible for any delay, his contractual recovery may be reduced to prevent the  
14 attorney from profiting from the accumulation of benefits during the pendency of the  
15 case in court. *Id.* (citation omitted). Additionally, if the benefits are large in  
16 comparison to the amount of time counsel spent on the case, a downward adjustment  
17 might be appropriate. *Id.* (citations omitted).

18 **C. The Reasonableness Of The Fees Yielded By The Instant Contingency Fee**  
19 **Agreement.**

20 In this case, the sole issue is the reasonableness of the fees yielded by the  
21 contingency fee agreement between Plaintiff and his counsel. While Plaintiff’s counsel  
22 acknowledges the EAJA offset, the amount of fees subject to the court’s analysis  
23 remains the aggregate derived from the agreement: twenty-five percent of the past-due  
24 benefits, according to Plaintiff’s counsel. The Motion includes a declaration of counsel  
25 and documentation supporting counsel’s fee request.

26 The Court is satisfied that the fee sought under the contingency agreement is  
27 reasonable. As with any contingency fee agreement, the risk of loss in this case was  
28

1 substantial.

2 The character of the representation in this case was not substandard and attests to  
3 the reasonableness of the fee. Plaintiff's counsel was successful in obtaining an order  
4 for remand for further proceedings. On remand, the Commissioner granted Plaintiff's  
5 application for benefits, entitling her to receive approximately \$40,216.00 in retroactive  
6 benefits. The results of the representation, therefore, support the reasonableness of the  
7 fee. As one court recently observed in a Section 406(b) case:

8 Attorneys who take cases on contingency, thus deferring payment of their  
9 fees until the case has ended and taking upon themselves the risk that they  
10 will receive no payment at all, generally receive far more in winning cases  
11 than they would if they charged an hourly rate. The difference, however,  
12 reflects the time value of money and the risk of non-recovery usually borne  
13 by clients in cases where lawyers are paid an hourly rate.

14 Coppett v. Barnhart, 242 F. Supp. 2d 1380, 1384 n.7 (S.D. Ga. 2002) (citing Hensley v.  
15 Eckerhart, 461 U.S. 424, 448-49, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (Burger, J.,  
16 concurring)). Significantly, since Gisbrecht, district courts have been deferential to the  
17 terms of contingency contracts in Section 406(b) cases, accepting that the resulting de  
18 facto hourly rates may exceed those for non-contingency fee arrangements. Hearn, 262  
19 F. Supp. 2d at 1037 (awarding \$25,132.50 in Section 406(b) fees, equivalent to \$450.00  
20 per hour) (citing, inter alia, Martin v. Barnhart, 225 F. Supp. 2d 704 (W.D. Va. 2002)  
21 (awarding \$10,189.50, equivalent to \$605.00 per hour); Coppett, 242 F. Supp. 2d 1380  
22 (awarding \$6,554.12, equivalent to \$350.49 per hour).

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1 In conclusion, the Court finds that the fee requested by Plaintiff, which does not  
2 exceed the twenty-five percent statutory ceiling of Section 406(b), is reasonable under  
3 the inquiry called for by Gisbrecht. Plaintiff's counsel shall be paid the sum of  
4 \$10,000.00 from the amount withheld by the Commissioner from Plaintiff's past-due  
5 benefits. Plaintiff's counsel shall reimburse Plaintiff the sum of \$4,000.00 in EAJA fees  
6 already paid.

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8 **IT IS SO ORDERED.**

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10 DATED: March 17, 2009

  
HONORABLE OSWALD PARADA  
United States Magistrate Judge